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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

GEORGE MISKOVSKY,
Petitioner,
v.

TULSA TRIBUNE COMPANY, and
NEWSPAPER PRINTING CORPORATION,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA**

EVERETT J. SWEENEY
Counsel of Record
E. JOE LANKFORD
303 South Peters
Norman, Oklahoma 73069
(405) 360-2254
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does the United States Constitution supplant state defamation law on the issues of defamatory meaning, opinion, and burden of proof as to truth?
2. Does the United States Constitution require a balancing between the rights of media defendants and the rights of candidates for public office to freedom of speech and protection of reputation?

TABLE OF CONTENTS

	Page
OPINION AND ORDER BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Procedural Background	2
B. Identification of Parties	2
C. Factual Basis of the Libel Claim	3
1. The Press Conference	3
2. The Tribune's Reaction	4
D. Federal Questions Properly Raised	5
REASONS FOR GRANTING PETITION	5
I. THE UNITED STATES CONSTITUTION DOES NOT SUPPLANT STATE DEFAMA- TION LAW ON THE ISSUES OF DEFAMA- TORY MEANING, OPINION AND BURDEN OF PROOF	6
II. THE FIRST AND FOURTEENTH AMEND- MENTS PROHIBIT A RULE OF LAW WHICH GRANTS VIRTUAL ABSOLUTE IM- MUNITY TO A MEDIA DEFENDANT FROM LIBEL SUITS BROUGHT BY A PUBLIC FIGURE BECAUSE SUCH A RULE WOULD CHILL THE FIRST AMENDMENT RIGHTS OF PETITIONER AND OTHER CANDI- DATES FOR PUBLIC OFFICE	10
CONCLUSION	18

TABLE OF CONTENTS—Continued

APPENDIX	Page
A—Opinion of the Supreme Court of the State of Oklahoma Affirming Sustention of Defendant Tribune's Demurrer and Determination that Defects Not Amendable entered on June 21, 1983	1a
B—Order of the Supreme Court of the State of Oklahoma Denying Petitioner's Motion for Rehearing entered on September 20, 1983	16a
C—Plaintiff's First Amended Petition including Exhibits, filed May 16, 1980	18a
D—"FOE SAYS BOREN 'OVERREACTION'—Miskovsky questions sexual conduct"; The Tulsa Tribune, August 11, 1978	34a
E—"BACKLASH TO HELP BOREN?—Candidates wait for reactions from personal attack"; The Tulsa Tribune August 11, 1978	39a
F—"THE UNQUALIFIED CANDIDATE"—The Tulsa Tribune, August 11, 1978	44a
G—Editorial Cartoon—The Tulsa Tribune, published August 11, 1978	46a
H—Editorial Cartoon—The Tulsa Tribune, published August 15, 1978	47a
I—"SOMETIMES THE PRESS A SHADE HYPOCRITICAL"—The Tulsa Tribune, August 17, 1978	48a
J—"BOREN REVERSES TACTICS—Governor swears he disapproves of homosexuality"; The Tulsa Tribune, August 24, 1978	51a
K—Editorial Cartoon & Editorial "Boren's Overkill"; The Tulsa Tribune, August 25, 1978	56a
L—Oklahoma Statutes Tit. 12 § 1441	57a

TABLE OF AUTHORITIES

Cases:	Page
Associated Press v. United States, 326 U.S. 1 (1945)	11
Buckley v. Valeo, 424 U.S. 1, 14 (1976)	10, 11
Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977)	8
Ciani v. New York Times, 6 Med. L. Rptr. 1625 (1980)	9
Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971)	9
Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967)	9
First National Bank of Boston v. Bellotti, 435 U.S. 776 (1978)	11
Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)	6, 7, 10
Hetherington v. Griffin Television, Inc., 430 F.Supp. 493 (W.D. Okla. 1977)	9
Illinois State Board of Elections v. Socialist Work- ers Party, 440 U.S. 178 (1979)	12
Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587 (Okla. 1982), cert. denied, — U.S. —, 103 S.Ct. 235 (1982)	7, 9
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)....	10
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	10, 12, 13
New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)	5, 7, 9
Pell v. Procunier, 417 U.S. 817 (1974)	11
Pennekamp v. Florida, 328 U.S. 331, 364 (1946)	11
Rand v. New York Times, 4 Med.L.Rptr. 1557 (1978)	9
St. Amant v. Thompson, 390 U.S. 7217 (1968)	9
Thornhill v. Alabama, 310 U.S. 88 (1940)	11
Williams v. Rhodes, 393 U.S. 30 (1968)	12
Wimmer v. Oklahoma Publishing Co., 1 P.2d 671 (Okla. 1931)	6
Zacchini v. Scripps-Howard Broadcasting Co., 133 U.S. 562 (1977)	8

TABLE OF AUTHORITIES—Continued

Treatises and Law Review Articles:	Page
Eaton, "The American Law of Defamation through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer", 61 Va. L. Rev. 1349 (1975)	9
Eldredge, L.H., <i>The Law of Defamation</i> § 49 at page 248	13
Franklin, "Winners and Losers and Why: A Study of Defamation Litigation", Am. Bar Association Research J. 493, 498 (Summer 1980)	12
Hill, "Defamation and Privacy Under the First Amendment", 76 Columbia L. Rev. 1205 (1976)	8
Restatement (Second) of Torts, § 566 (1977)	9
 Constitutional Provisions:	
U.S. Constitution, Amendments I, XIV	<i>passim</i>

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No.

GEORGE MISKOVSKY,
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v.

TULSA TRIBUNE COMPANY, and
NEWSPAPER PRINTING CORPORATION,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA**

Petitioner, George Miskovsky, respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Oklahoma, entered on June 21, 1983, affirming the trial court's sustention of a demurrer to Miskovsky's libel petition, and determining that said petition was not amendable.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Supreme Court, which appears in the Appendix at 1a, has been officially reported at Vol. 54 Oklahoma Bar Journal 1751. The order of the Oklahoma Supreme Court denying petitioner's motion for rehearing appears at Appendix B, page 16a.

JURISDICTION

The opinion of the Oklahoma Supreme Court in this case was issued on June 21, 1983. The order denying petitioner's motion for rehearing was issued on September 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment I: Congress shall make no law . . . abridging the freedom of speech, or of the press . . .
2. United States Constitution, Amendment XIV § 1: [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Procedural Background

Petitioner, George Miskovsky, [hereinafter "petitioner" or "Miskovsky"], a candidate in 1978 for the United States Senate, instituted this action for libel in the District Court of Creek County, Oklahoma. The libel arises out of four newspaper stories, two editorials, and three editorial cartoons, all appearing in The Tulsa Tribune, a newspaper published by the respondents Tulsa Tribune Company and Newspaper Printing Corporation [hereinafter "The Tribune"].

The District Court of Creek County, Oklahoma, sustained a demurrer to Miskovsky's petition and determined that the petition was not amendable. The Supreme Court of the State of Oklahoma affirmed the trial court's ruling on June 21, 1983.

B. Identification of Parties

1. Petitioner George Miskovsky, son of immigrant parents, was born and raised in Oklahoma. He graduated

from the University of Oklahoma Law School with high honors, including induction into Order of the Coif. Upon graduation from law school, Miskovsky was admitted to the Oklahoma Bar. He has practiced law in Oklahoma City for more than forty years. During his career, Miskovsky has served as Public Defender, County Attorney, State Representative, and State Senator. In 1958, he was a candidate for Governor. Twenty years later, at the age of sixty-eight, Miskovsky became a candidate for the office of United States Senator.

2. Respondents are privately held media corporations controlled by the Jones family. The newspapers involved in this case and its companion case are *The Tulsa Tribune* and *The Tulsa World*. These papers have a combined circulation of approximately 205,000 daily copies and 220,000 Sunday copies and are distributed throughout the states of Oklahoma, Kansas, Arkansas and Missouri.

C. Factual Basis of the Libel Claim

The factual basis of the libel claim is summarized below from Miskovsky's First Amended Petition filed May 16, 1980, and upon which the trial court sustained a demurrer and the Supreme Court of Oklahoma affirmed.

1. *The Press Conference*

On August 9, 1978, during the course of the United States Senate primary race, Miskovsky attended a candidate's forum in El Reno, Oklahoma, sponsored by the Women's Democratic Club of Canadian County. The forum was open to all candidates, including Governor Boren, State Senator Gene Stipe, former Congressman Ed Edmondson, Dean Bridges, Rosella Saker, and Anthony Points. In addition to Miskovsky, only candidates Bridges and Points chose to attend.

While addressing the group, candidate Points read from a political flyer, copies of which he had distributed to the audience. In part the flyer stated:

"I am against homosexuals or bisexuals in office or government. They are threats to our national security. They are subject to be blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.

"There is a side of David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.

I don't think that is what you want for a U.S. Senator."

In addition to reading these remarks, candidate Points categorically stated that "Governor David Boren is a homosexual".

Prior to this public charge by candidate Points, Miskovsky, as well as The Tribune, had heard homosexual rumors that had been in circulation for four years or more concerning candidate Boren. These rumors were verified by the Governor's own staff.

The following day, August 10, Miskovsky delivered a letter to Governor Boren's office. The letter quoted the charges made by Points and requested the Governor to answer the charges under oath. The letter made clear that Miskovsky himself was making no allegations about Governor Boren. The letter also made clear that the purpose of the inquiry was for national security reasons since "A U.S. Senator has access to highly sensitive information vital to the defense of this country and our NATO allies." Appendix 29a.

Miskovsky attended a press conference that same day and distributed copies of the letter to members of the news media.

2. *The Tribune's Reaction*

From August 11-25, The Tribune published four news stories, two editorial, and three editorial cartoons falsely

charging or implying that Miskovsky had accused Governor Boren of homosexuality and Miskovsky was therefore unqualified to be elected U.S. Senator. One of the scurrilous effigies published by The Tribune depicts Miskovsky, with a lustful and satisfied look on his face, sucking upon a sewer pipe that has the appearance of a male penis; a clear implication of the commission of the crime of sodomy. Appendix D, page 34a *et seq.*

D. Federal Questions Properly Raised

The federal questions raised in this petition were properly raised before the Oklahoma Supreme Court. Petitioner contended (1) that the United States Constitution does not supplant state defamation law on the issues of defamatory meaning, opinion, and burden of proof; (2) that defamatory statements of opinion are not protected under the First Amendment to the Constitution of the United States; and (3) that the First and Fourteenth Amendments prohibit a rule of law which grants virtual absolute immunity to a media defendant from libel suits brought by a public figure. Appellant's Brief in Support of Petition for Rehearing at 2-7.

REASONS FOR GRANTING PETITION

When this Court ruled in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), that the First Amendment requires a public figure to prove actual malice in order to prevail in a libel case, the Court did not intend to abolish the common law of libel. The Oklahoma Supreme Court, however, erroneously concluded that under *New York Times* and its progeny the Oklahoma law of libel had been supplanted by federal constitutional law.

It is apparent from the opinion of the Oklahoma Supreme Court that the Court incorrectly believed that state law on the issues of defamatory meaning, opinion,

and burden of proof have been both superseded and controlled by the requirements of the Constitution.

Thus, this Court should grant review because the decision of the Oklahoma Supreme Court raises important federal questions not decided by this Court concerning the extent of federal constitutionalization of state defamation law.

I. THE UNITED STATES CONSTITUTION DOES NOT SUPPLANT STATE DEFAMATION LAW ON THE ISSUES OF DEFAMATORY MEANING, OPINION AND BURDEN OF PROOF

Independent state law on the subject of defamatory meaning is found in *Wimmer v. The Oklahoma Publishing Company*, 1 P.2d 671, 673 (Okl. 1931) :

"The publication cannot be measured by its effect when subjected to the critical analysis of a legal mind; it must be measured by its natural and probable effect upon the mind of the average lay reader."

It is clear from the Supreme Court of Oklahoma's opinion that each publication was in fact subjected to the critical analysis of legal minds under the mistaken conclusion that the Constitution requires such construction.

Further, in deciding that the publications are not defamatory, the Supreme Court of Oklahoma ruled that the publications are not actionable because they are merely expressions of opinion, privileged under the First Amendment. In making this determination, the Court relies on *dicta* contained in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) :

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

In *Miskovsky v. Oklahoma Publishing Company*, 654 P.2d 587 (Okl. 1982) cert. denied, ____ U.S. ___, 103 S.Ct. 235 (1982) Justice Rehnquist, with whom Justice White joined, dissenting, stated:

"Whether or not these particular statements in respondent's newspapers were actionable under state and federal constitutional law is not clear to me. What is clear is that the Supreme Court of Oklahoma, apparently feeling itself bound by the Decisions of this Court in cases such as *New York Times v. Sullivan*, *supra*, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) said categorically that several of respondent's statements were simply statements of opinion, and that "[a]s opinions they are not statements of fact, and therefore cannot be false." Pet. 12a (emphasis supplied).

"The Supreme Court of Oklahoma also said:

'Like the U.S. Supreme Court, we also, in proper cases, must review the evidence to make certain that constitutional principles have been correctly applied. The case before us is such an instance.' — P.2d — (Okl. 1981).

"From this and similar statements in its decision, it is quite possible to conclude that the Supreme Court of Oklahoma thought that the entire law of defamation, hitherto the province of the states, had been preempted by federal constitutional standards. This, of course, is not the case, as we have made clear in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and succeeding cases. If statements in the decision of the Supreme Court of Oklahoma such as that quoted above with respect to "opinion" not forming the basis of a libel action were applications of Oklahoma law, they would of course present no federal question. But it seems probable to me that the Supreme Court of Oklahoma in discussing the subject was relying on the following *dicta* in *Gertz v. Robert Welch, Inc.*, *supra*:

'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' 418 U.S., at 340.

"A respected commentator on the subject has stated with respect to this quotation that '[t]he problem of defamatory opinion was not remotely an issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem.' Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205 (1976).

"Examples of the 'rich and complex history' of the common law's effort to deal with the question of opinion are found in an entire chapter headed "Opinion" in R. D. Sack, *Libel, Slander, and Related Problems* (1980). I am confident this Court did not intend to wipe out this 'rich and complex history' with the two sentences of *dicta* in *Gertz* quoted above. The Supreme Court of Oklahoma's statement that opinion was not actionable may fairly be read to suggest that the court felt this result to be compelled by the United States Constitution, rather than merely being a statement of Oklahoma law. Under these circumstances, we have jurisdiction to review the judgment of the Supreme Court of Oklahoma, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), and I would exercise that jurisdiction by granting the petition for certiorari in this case."

Courts and commentators have concluded that the press is not immunized by a constitutional exception for defamatory statements of opinion. A statement labelled "opinion" mixed with fact or which imply the existence of undisclosed defamatory facts do not enjoy the protection of the First Amendment. *Buckley v. Littell*, 539

F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977); *Restatement (Second) of Torts*, Sec. 566 (1977); *Rand v. New York Times*, 4 Med. L. Rptr. 1557 (1978); *Ciani v. New York Times*, 6 Med. L. Rptr. 1625 (1980).

Additionally, the Supreme Court of Oklahoma has shifted the burden of proof under the belief that the Constitution requires a public figure plaintiff to prove falsity. Citing *Miskovsky v. Oklahoma Publishing Company*, *supra*.

Under independent state law, truth has been an affirmative defense to a libel action. *Hetherington v. Griffin Television, Inc.*, 430 F.Supp. 493 (W.D. Okl. 1977).

New York Times v. Sullivan, *supra*, did not shift the burden to plaintiff to prove the falsity of a defamatory communication. Eaton, *The American Law of Defamation Through—Gertz v. Robert Welch, Inc., and Beyond: an analytical Primer*, 61 Va. L. Rev. 1349, 1381-1382 (1975).

Subsequent decisions of this Court have continued to refer to truth as a defense. *St. Amant v. Thompson*, 390 U.S. 727, 731-732 (1968). Consider also the words of Justice Harlan in *Curtis Publishing Co. v. Butts*, 388 130, 151 (1967), that truth is "an absolute defense in almost all cases."

The inequity of requiring a public figure libel plaintiff to prove falsity was pointed out by the Pennsylvania Supreme Court:

"Common decency would seem to require that the defaming defendant have the burden of substantiating the accusations, especially when, in many instances, a defamed but innocent plaintiff may not be able to adduce more evidence than a denial that he or she committed the offense charged." *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 468, 273 A.2d 899, 917 (1971).

Freedom of the press under the First Amendment does not include the absolute license to destroy lives and careers. *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 339-41. The extraordinary protections afforded to the press by the First Amendment carry with them a type of fiduciary duty to exercise the protected rights responsibly. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976). When the press violates this fiduciary duty, then the injured party should be entitled to recover for damages to his reputation.

In sum, this Court should review the Oklahoma Supreme Court decision and decide the extent to which federal constitutional law has supplanted state law in libel actions.

II. THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT A RULE OF LAW WHICH GRANTS VIRTUAL ABSOLUTE IMMUNITY TO A MEDIA DEFENDANT FROM LIBEL SUITS BROUGHT BY A PUBLIC FIGURE BECAUSE SUCH A RULE WOULD CHILL THE FIRST AMENDMENT RIGHTS OF PETITIONER AND OTHER CANDIDATES FOR PUBLIC OFFICE

The first amendment fulfills an important function in our society in preserving the integrity of the electoral process. As this Court has observed, “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The constitutional guarantee of freedom of speech “has its fullest and most urgent application precisely to the conduct of campaigns for public office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). “The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election.” *Buckley v.*

Valeo, supra, 424 U.S. at 52. "Democracy depends on a well informed electorate, not a citizenry . . . limited in its ability to discuss and debate candidates and issues." *Id.* at 49, n.55. Further, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston v. Bellotti*, 435 U.S. 776, 782 (1978); *Cf. Pell v. Procunier*, 417 U.S. 817 (1974). "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Id.*, at 802 (Burger, C.J., concurring), citing *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring). "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'" *Associated Press v. United States*, 326 U.S. 1, 20 (1945), cited in *Bellotti, supra*, 435 U.S. at 777, n.12. The Oklahoma Supreme Court's decision sustaining a demurrer to Miskovsky's petition without leave to amend infringes upon Miskovsky's First and Fourteenth Amendment rights and encourages the press to limit public debate in future elections.

The Constitution serves significant societal interests and often protects interests broader than those of the party seeking their vindication. As this court emphasized in *Bellotti, supra*, 435 U.S. at 776:

"Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940).

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo, supra*, 424 U.S. at 48-49.

To allow the Oklahoma Supreme Court's decision to stand would effectively grant the press immunity and permission to knowingly defame and villify any candidate not to its liking under the cloak of the First Amendment.¹ Further, to allow the decision to stand will discourage many good men and women from entering the political arena for fear of becoming subject to the same type of attack by irresponsible members of the press.

"The authors of the Bill of Rights did not undertake to assign priorities" to constitutional rights. *Nebraska Press Association v. Stuart*, 427 U.S. 539 at 561. Nor did the authors of the Bill of Rights intend that freedom of the press vested in a multi-media conglomerate be abused with impunity and with immunity in such a fashion as to stifle petitioner's First Amendment rights.² The policies and political principles underlying the Bill of Rights require a balancing between petitioner's right to protect his reputation and to speak freely during a campaign for public office and the press's right of fair

¹ According to a recent survey, plaintiffs suing media defendants fare badly and win judgments in only 5% of the media appeals. The survey included only reported cases, most of which were appellate cases. Therefore, the survey seems to overstate the likelihood of a successful suit for libel by a public figure because defendants are much less likely to accept adverse judgments at the trial level than are plaintiffs. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, Am. Bar Foundation Research J., 493, 498 (Summer 1980).

² In its attack on Miskovsky, the press is also restricting the access of Oklahomans to the ballot, effectively burdening two separate rights—"the rights of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 30 (1968), cited in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). By infringing on petitioner's rights, the press "impairs the voters' ability to express their political preferences." *Id.* In his action for defamation petitioner thus seeks to vindicate these rights as well.

comment. The grant of virtual absolute immunity to the press would require a candidate who runs for public office without the press's endorsement to sacrifice his right of free speech and his right to his good name as a condition of candidacy, contrary to *Nebraska Press Association*.³ For where law ends, tyranny begins.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Supreme Court of Oklahoma reversed with directions that Miskovsky be allowed his day in court before a jury of his peers.

Respectfully submitted,

EVERETT J. SWEENEY
Counsel of Record
E. JOE LANKFORD
303 South Peters
Norman, Oklahoma 73069
(405) 360-2254
Attorneys for Petitioner

³ State constitutions approved contemporaneously with the passage of the Bill of Rights do not reveal any settled belief that civil awards of damages for defamation were inconsistent with the right of free speech and free press; in fact, some state constitutional provisions adopted in the late eighteenth and early nineteenth centuries expressly stated that the rights of free speech and free press could be abused by defamation. L. H. Eldredge, *The Law of Defamation*, Sec. 49 at 248. Neither did the states intend to modify their own laws concerning defamation when they ratified the Fourteenth Amendment, *Id.* at 251.

APPENDICES

APPENDIX A

**IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA**

No. 55,430

GEORGE MISKOVSKY,

Appellant,

v.

TULSA TRIBUNE COMPANY, a corporation, and
NEWSPAPER PUBLISHING CORPORATION, a corporation,
Appellees.

[Filed Jun. 21, 1983]

**APPEAL FROM THE DISTRICT COURT OF
CREEK COUNTY, OKLAHOMA**

Honorable Charles S. Woodson, Trial Judge

Appeal from an order of the trial court sustaining a demurrer to the original petition and to the amended petition in a libel case, and determining that the petition's defects are not amendable.

AFFIRMED

Carroll E. Gregg, Miskovsky, Sullivan, Miskovsky, Cooke & Gregg, Oklahoma City, Oklahoma, for Appellant.

James M. Sturdivant, John Henry Rule, Gable, Gotwals, Rubin, Fox, Johnson & Baker, Tulsa, Oklahoma, for Appellees.

LAVENDER, J.:

For the purposes of this appeal, we need only consider the sufficiency of the allegations set forth in the amended petition to withstand a demurrer, the amended petition being identical to the original petition, except that the amended petition contains general allegations of special damages.

The amended petition alleges that defendants below are engaged in printing, publishing, and circulation of a newspaper known as The Tulsa Tribune of general circulation in Creek County, State of Oklahoma. Plaintiff below is a resident of Oklahoma City, a graduate of the University of Oklahoma, and a widely known practicing attorney since admitted to the Bar in 1936. He has a reputation of being a successful and responsible attorney and member of his profession. He has also been a successful businessman, active in civic and social affairs in the community and state, and at all times herein referred to, he was a duly qualified and filed candidate for the office of United States Senator.

The amended petition alleges the publication by defendant of nine separate items in the newspaper, alleged to be libelous, six of which are writings, and three cartoons, all relating generally to the then political campaign for the office of United States Senator. We will first consider the allegations pertaining to the writings.

1. The first is an editorial appearing in the newspaper on August 11, 1978, headlined, "The Unqualified Candidate." A fair and objective reading of the publication discloses that it states that plaintiff, who received less than two percent of the vote in his last statewide campaign, desperately needed a political issue to put life into his hopeless campaign, asked Governor Boren, the acknowledged frontrunner in the senate race whether Boren is a homosexual or bisexual, and characterizing the query as a cruel variation of the proverbial lawyer's question, "Have you stopped beating your

wife?", and an irresponsible smear. The article further states that the query was made without evidence of the other candidate's sexual abnormality, but was premised upon a campaign statement by a third candidate who, without any supporting evidence, stated that Boren is a homosexual. The editorial concludes by stating that the voters should not be swayed by plaintiff's descent to sewer politics, and strongly suggests that plaintiff is unqualified to be senator.

2. On the 17th day of August, 1978, an article purportedly written by one E. N. Earley entitled, "Sometimes the press a shade hypocritical," appeared in the newspaper. The article states:

"Sometimes we members of Oklahoma's fourth estate are a bit too pious.

"Such is the case with the George Miskovsky-Gov. Boren dispute.

"When trailing Senate candidate Miskovsky asked Boren to answer questions about his sexual habits, editorial writers were enraged.

"They called Miskovsky 'A Voice From the Sewer.' "Miskovsky's remarks were a cheap publicity stunt. But the editorial writers' surprise and shock reeks of hypocrisy."

The article further states Boren's sexual preferences were a subject of gossip among the members of the press, that Boren was aware of the gossip, but was advised that a public denial would only give credence to the rumors.

"But when Miskovsky brought up the subject, the press was flabbergasted.

"There is little doubt that Miskovsky's voice came from a sewer, but it is a sewer that was constructed—in part—by the press."

3. On the 24th day of August, 1978, an article purportedly written by one Will Sentell entitled, "Boren reverses tactics * * * Governor swears he disapproves of homosexuality," appeared in the newspaper. A fair import of the article is a speculation upon the outcome of the forthcoming election engendered by Governor Boren's public denial under oath that he has ever been a homosexual or bisexual and that he approves or condones such activities.

The article further states: "'Boren got the message from the voters,' Miskovsky said. 'His delayed answer under oath to the questions I asked puts the issue to rest as far as I'm concerned.'"

4. On the 25th day of August, 1978, an editorial appeared in the newspaper headed "Boren's overkill." It states:

"The spectacle of Oklahoma's Governor David Boren calling a press conference to swear on the Bible that he was not a homosexual not only marked some kind of a first in American political history, but it was utterly unnecessary.

"The sensational innuendo advanced by George Miskovsky in a desparate effort to gain attention for his senate campaign had already exploded in Miskovsky's face. His miniscule vote was proof enough.

"The governor pleaded not guilty in the face of no evidence to the contrary. Surely, he has a soft, baby face. But so did Audie Murphy, the most decorated U.S. hero of World War II. The governor opened himself to an immediate lampoon by his runoff opponent, Ed Edmondson, who publicly swore he was not and never intended to be a Republican.

"Instead of swearing, the Governor should have simply shrugged."

5. On the 11th day of August, 1978, an article purportedly written by one Richard Tapscott appeared entitled, "Foe says Boren 'overreacted' Miskovsky questions sexual conduct." The article quoted plaintiff as saying Governor Boren and the editorial writers "overreacted" to his bringing to the public the charges made by the third candidate regarding Boren's alleged sexual preferences and conduct. "They acted emotionally as if I had made the charge. I heard the rumor, as have many others, for months. When it came to a head in a public forum, I felt I should report it to the media and give the governor an opportunity to respond." It related that plaintiff said he had received many calls, but none that says he should not have called it to the attention of the media. A spokesman for the Boren campaign was quoted as saying, "People seem to be outraged by it." Plaintiff was further quoted as saying, "I have seen these rotten, dirty, scurrilous, below-the-belt editorials before." The article speculated upon the effect of the "issue" upon the political campaign, then quoted from an anonymous "political analyst" that, "The Anthony Points thing was nothing. Miskovsky made a tremendous blunder."

6. On the 12th day of August, 1978, there appeared in the newspaper a news analysis purportedly written by one Will Sentell. In the article, the statement is made:

"When longshot contenders Anthony Points and George Miskovsky quizzed Boren on his sexual life, specifically whether he is a homosexual or bisexual, without offering any evidence, a muddy race got a lot muddier.

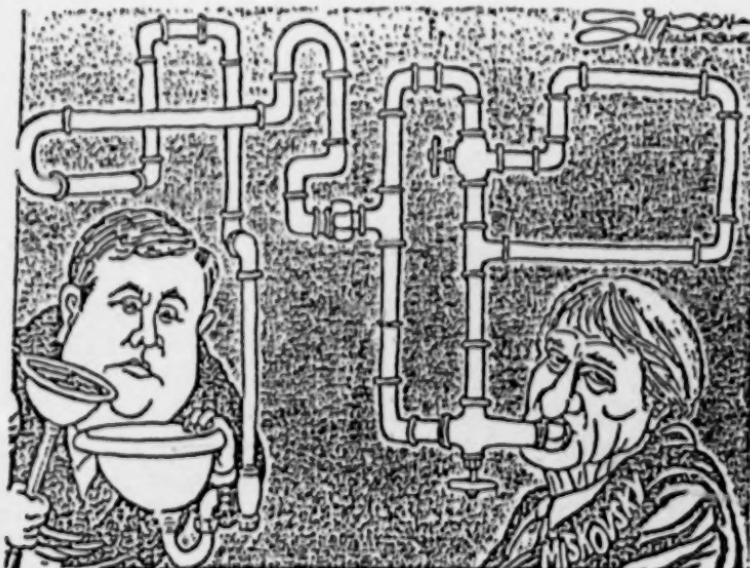
"Besides the fact Boren categorically denied the allegation, which was roundly trounced on by the state press, supporters are trying to gage what, if any, impact to expect.

"Most of the early indicators are pointing toward more good than harm going to the governor.

"A charge like the one lodged, the theory goes, will wind up bringing down fence sitters who might have otherwise stayed out of the race, or at least out of Boren and his Broom Brigade camp."

The balance of the article, insofar as pertinent, speculates upon the effect of the "issue" thus raised will have upon the election results.

7. On August 11, 1978, defendant published a cartoon, a reproduction of which is as follows:



8. On August 15, 1978, the defendants published a cartoon, a reproduction of which is as follows:



9. On August 25, 1978, defendants published a cartoon depicting in caricature an effigy of President Carter saying, "Ah've lusted after women in muh heart—" and an effigy of Governor Boren saying, "Me too! Me too!" with no reference to the plaintiff being contained within the cartoon.

In the case of *Miskovsky v. Oklahoma Pub. Co.*, Okl., 654 P.2d 587 (1982), this Court considered in detail the burden plaintiff must meet as a public figure in order to maintain an action in libel generally. The plaintiff must show:

- (1) The publication of a defamatory statement;
- (2) That the defamatory statement was false;
- (3) That the defamatory falsehood was made with "actual malice"—made with knowledge that it was false, or with reckless disregard of whether it was false or not;

- (4) The "actual malice" must be shown with "convincing clarity";
- (5) The state of mind required for actual malice would have to be brought home to the person in the publishing organization having responsibility for the publication of the alleged libelous publication;
- (6) To be made with "reckless disregard," there must be a showing that the publisher in fact entertained serious doubt as to the truth of the publication.

In *Fite v. Oklahoma Pub. Co.*, 146 Okl. 150, 293 P. 1073 (1930), we held that words charged to be defamatory and therefore libelous fall into three classes:

- (1) Those not of defamatory meaning;
- (2) Those reasonably susceptible of both a defamatory and an innocent meaning (commonly referred to as libel per quod); and
- (3) Those clearly defamatory on their face (commonly referred to as libel per se). (In accord, see *Akins v. Altus Newspapers, Inc.*, Okl., 609 P.2d 1263 (1977), cert. den., 101 S.Ct. 564.)

And, in *Winters v. Morgan*, Okl., 576 P.2d 1152 (1978), we held that in testing the sufficiency of the petition to withstand a demurrer, the entire writing must be examined by the Court to determine as a matter of law whether or not the article is libelous per se, observing: "Language out of context may have a different meaning than the same language within the four corners of the (publication)."

In *Fite v. Oklahoma Pub. Co.*, *supra*, we said: "The true rule is that, where the publication alleged to be defamatory charges the plaintiff with nothing he might not have legally and properly done, the same cannot be

held to be libelous per se." *Fite* further held that a judicial review of whether the publication is libelous per se turns on whether the statements made in the publication, when construed by the most natural and obvious meaning and in the sense that they would be understood by those to whom they were addressed, charged the plaintiff with anything that the plaintiff might not have legally and properly done.

Tested by the foregoing principles, a careful review of the publications both separately and together clearly shows that none of them, nor do all of them collectively, state a cause of action for libel per se. None of the publications charge the plaintiff with a commission of a crime or with anything that the plaintiff might not have legally and properly done. The factual data therein set forth as *facts* are true as is alleged in the allegations in plaintiff's petition. When viewed even in their most derogatory sense as related to the plaintiff, while possibly unflattering or even reprehensively false in *their conclusions*, they are expressions of opinion, privileged under the First Amendment to the United States Constitution. Nor do the publications expose the plaintiff to public hatred, contempt, ridicule or obloquy, or tend to deprive him of public confidence, or injure him in his occupation within the meaning of 12 O.S. 1981, § 1441. *Thompson v. Newspaper Printing Corporation*, Okl., 325 P.2d 945 (1958). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1947), the United States Supreme Court said:

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

We next turn to the question of whether the publications are or *may be* libelous per quod. In *Akins v. Altus*

Newspapers, Inc., supra, this Court held (1276): "It is a matter of law for the court to determine if the publication was libelous per se, as opposed to a fact determination for the jury as to the publication being libelous per quod." We approach this issue from two aspects: (1) The requirements for a petition for libel per quod to withstand a demurrer with reference to special damages, and (2) the requirements for a petition for libel per quod to withstand a demurrer with reference to innuendo, that is, the explanation of words that are of doubtful or ambiguous meaning, and to attach to them their proper meaning.

I.

As to the first aspect, in *Fite v. Oklahoma Pub. Co.*, *supra*, this Court quoted with approval the holding in *McKenny v. Carpenter*, 42 Okl. 410, 414 P. 779 (780) (1914) wherein it is stated: ". . . where the article itself is not libelous per se, there must be an allegation of special damages, before a recovery can be had. . . . It is insufficient to allege generally that the plaintiff 'was and is greatly and permanently injured and damaged in his good name and reputation and was and is exposed to public contempt, hatred, and ridicule and has been caused to resign his position with the said city of Ardmore and has been damaged in his business and reputation in the amount of \$10,000' without showing by proper averment how the special damages were occasioned." (Citations omitted.)

Plaintiff contends that the amended petition conforms to the requirements set forth in 12 O.S. 1980, § 1444, and having done so, that is all he is required to do. However, we find no conflict between the requirements enunciated in *Fite, supra*, and § 1444.¹ While the

¹ 12 O.S. 1971, § 1444 provided: "In all civil actions to recover damages for libel or slander, it shall be sufficient to state generally what the defamatory matter was, and that it was published

amended petition does make general allegations of special damages alleged to have been sustained by the plaintiff, it is demurrably deficient in its failure to aver how the special damages were occasioned. *Haynes v. Alverno Heights Hospital*, Okl., 515 P.2d 568 (1978).

We next consider the requirements for a petition for libel per quod to withstand a demurrer with reference to innuendo.

The leading case in Oklahoma is *Kee v. Armstrong, Byrd & Co.*, 75 Okl. 84, 182 P. 494 (1919). In addressing the subject of libel per quod, the Court said (498) :

"If the publication is libelous, it must come within that class of cases as being reasonably susceptible of a defamatory as well as an innocent meaning, and those publications that are termed and designated as not libelous *per se*. In order for the petition to state a cause of action, it is necessary for the plaintiff to plead by way of inducement or averment, colloquium and innuendo, certain extrinsic facts which connect the plaintiff with the libelous publication and to plead the meaning the words have and that

or spoken of the plaintiff, and to allege any general or special damage caused thereby, and the plaintiff to recover shall only be held to prove that the matter was published or spoken by the defendant concerning the plaintiff. As a defense thereto the defendant may deny and offer evidence to disprove the charges made, or he may prove that the matter charged as defamatory was true, and in addition thereto, that it was published or spoken under such circumstances as to render it a privileged communication." (Emphasis added.)

The emphasized portion of the statute was declared unconstitutional in *Martin v. Griffin Television, Inc., Okl.*, 549 P.2d 85 (1976) pursuant to a determination that legislative creation of presumed malice by the State of Oklahoma is unconstitutional. The Legislature repealed 12 O.S. 1971, § 1444 by Laws 1980, c. 68 § 1, emerg. eff. April 10, 1980, and reenacted the section as § 1444.1, deleting only that portion declared unconstitutional, by Laws 1981, c. 21, § 2, operative April 7, 1981.

they would be understood to have in connection with the libelous article as published."

The Court further quoted with approval from the case of *Penry v. Dozier*, 161 Ala. 292, 49 South. 909 in part as follows:

"An 'innuendo' is only explanatory of the subject-matter . . . and is and can be explanatory only of such matter. It cannot extend the sense of the words beyond their own meaning unless something is put upon the record for it to explain (citations omitted). An innuendo cannot make a thing certain which is, in fact, uncertain. An innuendo cannot enlarge or restrict the natural meaning of words, nor can it introduce new matter. An innuendo cannot be proved, and it is for the court to decide whether given words or given publications are capable of the meaning ascribed to them by the innuendo, and for the jury to decide whether such meaning is truly ascribed to them. (Citations omitted.) Where words claimed to be defamatory are capable of conveying an innocent meaning, then there must be an averment and an innuendo showing not only that the words are intended by plaintiff in a defamatory sense, but that the hearers may have understood the language as conveying the alleged defamatory meaning. (Citation omitted.)"

And again (at p. 500) citing many authorities in support:

". . . an innuendo cannot be used to enlarge the meaning of words, nor attribute to them a meaning which they would not bear."

In *Oklahoma Pub. Co. v. Kendall*, 96 Okl. 194, 221 P. 762 (1923) it is held that the mere allegation in the petition that a publication alleged to be libel per quod that the publication was intended to charge plaintiff

with a specific crime is not sufficient, and being mere gratuitous conclusion of the pleader, cannot give the words a meaning which they do not otherwise have. In accord, see *Phoenix Printing Co. v. Robertson*, 80 Okl. 191, 195 P. 487 (1921).

In view of the foregoing authorities, we hold that the amended petition in the case before us is fatally deficient in allegations of innuendo sufficient to withstand a demurrer to the petition.

But there remains for our consideration the question of whether the petition *may by amendment* state a cause of action for libel per quod. The trial court held and determined that the petition could not be amended to state a cause of action, thus dismissing said cause with prejudice in the trial court's ruling sustaining the demurrer to the petition. Plaintiff challenges the ruling of the trial court.

Title 12 O.S. 1981, § 318 provides: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

In *Tipton v. Standard Installment Finance Company*, Okl., 418 P.2d 309 (1966), this Court, in construing said statute said:

"As will be noted from a reading of said statute, the allowance of such amendments is therein placed within the discretion of the court, and is not thereby made a matter of right."

In the case before us, no issue is raised as to the timeliness of a request to amend the amended petition as was present in *Tipton, supra*. Here, the trial court sustained defendants' demurrer to the petition and simultaneously determined that the deficiencies in the petition could not be cured by amendment. If the ruling of the trial court was reversible error in that the deficiencies

might reasonably have been cured by amendment, then this Court should upon reversal accord the plaintiff an opportunity to amend within a reasonable time.

When tested by the foregoing authorities pertaining to the necessary allegations of a petition to state a cause of action for libel per quod, we hold that all of the publications before us, including the cartoon which appeared in the newspaper on August 11, 1978, are clear and unequivocal in their meaning and import and therefore immutable to innuendo.

II.

The cartoon published on August 11, 1978, plaintiff urges, may become actionable as libel per quod by amendment to the petition. While the amended petition contains no allegations of innuendo pertaining to that publication, plaintiff *argues* in his brief: "The scurrilous effigy clearly shows a character that looks like the Appellant sucking upon a sewer pipe; and, coincidentally the end of that sewer pipe that he is sucking on just happens to have the appearance of a male penis." Thus, plaintiff reasons, in effect, the publication by innuendo is capable of charging him with the crime of sodomy.

The rules by which a pictorial cartoon's amenability to innuendo to explain its meaning and import are the same as in the case of writings. While, as we have heretofore pointed out, innuendo may be explanatory of the meaning of the publication alleged to be libelous, whether pictorial or writings, and of the understanding imparted to the ordinary viewer of the publication, innuendo cannot be used to enlarge that meaning or to attribute to it a meaning which it will not bear. An objective examination of the cartoon published August 11, 1978, neither by its unembellished presentation nor by the addition of any possible innuendo imparts to the plaintiff the commission of the crime of sodomy, and when viewed in its most derogatory sense, does no more

than express the writer's opinion of the political tactics of plaintiff's political campaign.

The ruling of the trial court sustaining demurrers to the original and amended petition and determining that the petition's defects are not amendable is affirmed.

BARNES, C.J., IRWIN, HODGES, and HARGRAVE, JJ., concur.

SIMMS, V.C.J., concurs in result.

WILSON, J., concurs in part and dissents in part.

DOOLIN, J., dissents.

OPALA, J., certified his disqualification.

APPENDIX B**IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA****Tuesday, September 20, 1983**

[Filed. Sep. 20, 1983]

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

- 55,430 George Miskovsky v. Tulsa Tribune Company, a corp. and Newspaper Printing Corporation, a corp.

Rehearing denied.

CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Hodges, Lavender, Hargrave, Wilson, JJ.

DISSENT: Doolin, J.

DISQUALIFICATION: Opala, J.

- 56,949 Doris Heddleston and Daniel Heddleston v. Don L. Summers d/b/a American Pawn Shop and Western Surety Co.

Certiorari denied.

CONCUR: Simms, V.C.J., Irwin, Lavender, Doolin, Wilson, JJ.

DISSENT: Barnes, C.J., Hodges, Hargrave, Opala, JJ.

- 57,714 Southeast Plaza Bank, Plaintiff v. Bert K. Bloomfield and Thelma Bloomfield v. J. D. McKean and Jerry Botchlet.

Certiorari denied.

- 57,854 R. Robert Reid, III and Dondra K. Reid, Husband and Wife v. Ray Bowman.

Certiorari denied.

CONCUR: Simms, V.C.J., Irwin, Lavender, Doolin, Hargrave, Opala, Wilson, JJ.

DISSENT: Barnes, C.J., Hodges, J.

- 57,877 Betty Louise Cleere v. Harry Davidson d/b/a Davidson Trucking; Bennett Lovejoy; United Parcel Service, Inc. etc. et al.
Certiorari denied.
CONCUR: Barnes, C.J., Irwin, Hodges, Lavender, Doolin, Hargrave, Opala, Wilson, JJ.
DISSENT: Simms, V.C.J.
- 57,901 Billy Jack Hendrix v. Marva J. Hendrix.
Certiorari denied.
CONCUR: Simms, V.C.J., Irwin, Hodges, Lavender, Doolin, Opala, Wilson, JJ.
DISSENT: Barnes, C.J., Hargrave, J.
- 57,988 Orville Hulsey and Francie Hulsey v. Town of Kiefer etc. and Oklahoma Natural Gas Company etc.
Certiorari denied.
CONCUR: Barnes, C.J., Sims, V.C.J., Irwin, Hodges, Hargrave, Opala, JJ.
DISSENT: Lavender, Doolin, Wilson, JJ.
- 58,006 Jerome D. McCoy, An Individual v. University of Tulsa etc.
Certiorari denied.
CONCUR: Simms, V.C.J., Irwin, Hodges, Hargrave, Wilson, JJ.
DISSENT: Barnes, C.J., Lavender, J.
DISQUALIFIED: Opala, J.
- 58,018 Audre' Henry v. Independent School District No. 93 of Pottawatomie County Oklahoma and Dr. Jeffrey Black et al. etc.
Certiorari denied.
CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Hodges, Lavender, Hargrave, Opala, Wilson, JJ.
DISSENT: Doolin, J.

/s/ Don Barnes
Chief Justice

APPENDIX C

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
(Drumright Division)

STATE OF OKLAHOMA

No. C-79-7

GEORGE MISKOVSKY,

Plaintiff,

vs.

TULSA TRIBUNE COMPANY, a corporation and
NEWSPAPER PRINTING CORPORATION, a corporation,
Defendants.

[Filed May 16, 1980]

FIRST AMENDED PETITION

I.

Defendant, TULSA TRIBUNE COMPANY, is an Oklahoma corporation licensed to do business in the State of Oklahoma, with its principal place of business in Tulsa, Oklahoma. Defendant, NEWSPAPER PRINTING COMPANY, is an Oklahoma corporation licensed to do business in the State of Oklahoma, with its principal place of business in Tulsa, Oklahoma.

II.

Defendants are engaged in printing, publishing, and circulation of a newspaper known as The Tulsa Tribune, a newspaper published in Tulsa, Oklahoma, and of gen-

eral circulation in Creek County and the State of Oklahoma.

III.

The Plaintiff, GEORGE MISKOVSKY, is a resident of Oklahoma City, a graduate of the University of Oklahoma, and a wifely known practicing attorney there since he was admitted to the Bar in 1936. He has a reputation of being a successful and responsible attorney and member of his profession. He is married, has four children and ten grandchildren. He has also been a successful businessman, active in civic and social affairs in the community and State, and at all times herein referred to, Plaintiff was a duly qualified and filed candidate for the office of United States Senator.

IV.

On the 11th day of August, 1978, the defendants, by and through their agents, servants, and employees, maliciously composed and published concerning the Plaintiff, an editorial on the editorial page of The Tulsa Tribune entitled, "The Unqualified Candidate", which contained false and defamatory matter designed to injure the Plaintiff GEORGE MISKOVSKY's character and reputation, professional standing in the State, and to destroy his chances to be elected United States Senator. The maliciously false and defamatory matter accuses Plaintiff, inter alia, of irresponsibly making an effort to smear Governor David Boren with an implication of homosexuality, of a descent to sewer politics, and engaging in a cruel variation of the proverbial lawyer's question, Have you stopped beating your wife? A true and correct copy of said editorial as above stated is attached hereto marked Plaintiff's "Exhibit 5" and made a part hereof by reference.

V.

On the 11th day of August, 1978, the Defendants, by and through their agents, servants, and employees, ma-

liciously composed and published concerning the Plaintiff, in the Tulsa Tribune, a cartoon drawing. Said cartoon drawing depicted Plaintiff speaking into a sewer pipe. Said cartoon drawing is false and defamatory matter designed to injure Plaintiff, GEORGE MISKOVSKY'S character and reputation, professional standing in the community, and chances to be elected United States Senator. A true and correct copy of said cartoon drawing is attached hereto marked Plaintiff's "Exhibit 6" and made a part hereof by this reference.

VI.

That on the 15th day of August, 1978, the Defendants, by and through their agents, servants, and employees, maliciously composed and published concerning the Plaintiff in the Tulsa Tribune a cartoon drawing. Said cartoon drawing depicted an individual from the press addressing Plaintiff who was depicted being down in a sewer manhole with the following question, "Uh, would you answer a few questions, Mr. Miskovsky?" Said cartoon drawing is false and defamatory matter designed to injure Plaintiff, GEORGE MISKOVSKY's character and reputation, professional standing in the community, and chances to be elected United States Senator. A true and correct copy of said cartoon drawing is attached hereto marked Plaintiff's "Exhibit 7" and made a part hereof by this reference.

VII.

On the 17th day of August, 1978, the Defendants by and through their agents, servants and employees, maliciously composed and published concerning the Plaintiff in the Tulsa Tribune an editorial column. Said column was entitled, "Sometimes the press a shade hypocritical". Said column by Tribune Washington correspondent E.N. Earley says, in part, "Sometimes we members of Oklahoma's fourth state are a bit too pious. Such is the case with George Miskovsky-Governor David Boren dispute.

When trailing Senate candidate Miskovsky asked Boren to answer questions about his sexual habits, editorial writers were enraged. They called Miskovsky 'A Voice From the Sewer'. Miskovsky's remarks were a cheap publicity stunt. But the editorial writers' surprise and shock reeks of hypocrisy. For nearly two years, reporters have been gossiping about Boren's private life. The stories grew each time the bartender brought another round or the reporters found a new audience. No one knows where the rumors started, but soon they were so widespread they were being whispered in Boise City and Idabel. Boren was aware of the gossip. He quietly sought advice from several political advisers, including some in Washington. From every friend he apparently got the same advice: do nothing. You can't call a press conference to deny slanderous gossip. Such a move would only give creditability to the rumors. Before Miskovsky babbled, not one member of the press asked Boren publicly what was being bandied about so easily in the press rooms. But when Miskovsky brought up the subject, the press was flabbergasted. There is little doubt that Miskovsky's voice came from the sewer, but it is a sewer that was constructed—in part—by the press." Said column is false and defamatory matter, designed to injure Plaintiff, GEORGE MISKOVSKY'S character and reputation, professional standing in the community and his chances to be elected United States Senator. A true and correct copy of the said editorial column is attached hereto and marked Plaintiff's "Exhibit 8".

VIII.

On the 24th day of August, 1978, the Defendant, by and through their agents, servants and employees, maliciously composed and published concerning the Plaintiff an editorial in the Tulsa Tribune. Said editorial was entitled, "Governor Swears He Disapproves of Homosexuality", which contains false and defamatory matter de-

signed to injure the Plaintiff George Miskovsky's character and reputation, professional standing in the State. The maliciously false and defamatory matter accuses Plaintiff of charging Governor David L. Boren with homosexuality. A true and correct copy of said editorial is attached hereto and made a part hereof, marked "Plaintiff's Exhibit 9".

IX.

On the 25th day of August, 1978, the Defendants, by and through their agents, servants and employees, maliciously composed and published concerning the Plaintiff in the Tulsa Tribune, an editorial on the editorial page. Said editorial was entitled, "Boren's Overkill". Said editorial says, in part, "The spectacle of Governor David Boren calling a press conference to swear on the Bible that he was not a homosexual not only marked some kind of a first in American political history, but it was utterly unnecessary. The sensational innuendo advanced by George Miskovsky in a desparate effort to gain attention for his senate campaign had already exploded in Miskovsky's face. His miniscule vote was proof enough." Said editorial is false and defamatory matter, designed to injure Plaintiff, GEORGE MISKOVSKY'S character and reputation, and professional standing in the community. A true and correct copy of said editorial is attached hereto and marked Plaintiff's "Exhibit 10".

X.

The Defendants are possessed of vast holdings, are reasonably worth many millions of dollars, and are capable of responding to compensatory and exemplary damages complained of and prayed for herein.

The Plaintiff, GEORGE MISKOVSKY, alleges and states the libel herein complained of was a viciously and maliciously done with utter disregard of the truth and directed at and toward the Plaintiff.

The Defendant's intent and purpose was to influence the public opinion and hold the Plaintiff up to scorn, obliquity, disrespect and ridicule.

The Defendant published the villifying, libelous and slanderous writings which were calculated and designed to set off widespread vilification, libel and slander of the Defendant.

Defendant did, with utter disregard for the truth and intentionally or with reckless disregard for the truth and facts, maliciously accuse the Plaintiff of crimes which are violation under the penal laws of the State of Oklahoma. The Defendants did intend to infer by their writing and characterizations that he Plaintiff charged David L. Boren with homosexuality which constitutes the crime of criminal libel and slander. Those writings and characterizations did create in the minds of multitudes of people all over Oklahoma that concept, thought and belief.

The Defendant's malicious libel and slander of Plaintiff was continued over a period of several days as will be seen by the writings and characterizations complained of herein.

XI.

The Plaintiff alleges that at all times the things herein complained of were written by Defendants against the Plaintiff, the Defendants were openly and actively supporting David L. Boren as their candidate for United States Senate and did so with various writings, editorials and feature stories that otherwise were not afforded to any other candidates in the United States Senate race.

The vicious and malicious libel and villification that is herein complained of was done to falsely accuse the Plaintiff of a crime or crimes and misdeeds to destroy the Plaintiff politically, personally and professionally, and

as a basis for further editorializing affirmatively for their candidate and on a false premise, to-wit: That the Plaintiff had charged and accused their candidate of being a homosexual and of frequenting with homosexuals.

This premise is completely false and that fact was known to the Defendant but the Defendant persisted with its accusations and implications.

In this regard, the Plaintiff says that on the 9th day of August, 1978, at the Ponderosa Restaurant in Canadian County, for the first time in a public forum Plaintiff heard David Boren categorically charged by another candidate, Anthony Points, of "frequenting with homosexuals", and of being a "homosexual".

Prior to this public attack and charge by Points, the Plaintiff had heard rumors of such behavior and of Boren being associated with persons of such purported behavior, and the Defendant likewise knew of such rumors and that same had been in circulation for four years or more. These rumors were verified by the governor's own staff, which fact the Defendant was aware of and knew.

The Ponderosa public meeting was sponsored by the Women's Democratic Club of Canadian County and was attended by three candidates for the United States Senate, George Miskovsky, Anthony Points and Dean Bridges. This was also known to the Defendant.

Other candidates were invited to the meeting, but only these three attended and spoke.

XII.

After candidate Points made the charges about Boren at the Ponderosa, i.e., that David Boren frequented with and was a homosexual, Plaintiff believed then and believes now that it was not only appropriate for him to ask the Governor to answer the charge but it was his

duty to call this to the attention of the Governor and the voters, and give the Governor an opportunity to answer straight forward questions concerning the charge.

To make certain there was no question about the rhetoric, the Plaintiff communicated his questions in a typewritten letter to the Governor and released copies of the letter to the press.

As a result of asking the questions of Boren, Plaintiff became the target of a vicious, malicious, and libelous villification launched by the Defendant and thereafter other members of the news media. This was one of the intended purposes of the Defendant's defamatory and libelous commentary and characterizations of Plaintiff.

The Defendants made the following comments in the news columns which illustrate its efforts to maliciously and viciously, libel and villify the Plaintiff.

The Plaintiff alleges and states that this is and was one of the most vicious, and villifying efforts made by the Defendants against any public servant, past or present.

As a result and proximate result of the Defendants malicious campaign of libel and villification, against Plaintiff, he suffered and experienced extreme mental, emotional and physical anguish, and his reputation as a lawyer was damaged and injured; his social standing destroyed and his name was besmirched.

All of which has caused the Plaintiff irreparable physical, mental, emotional and financial damage and injury.

XIII.

A copy of Plaintiff's letter to David L. Boren above mentioned is attached hereto as Plaintiff's "Exhibit 1" and made a part hereof by reference.

A copy of the flyer wherein Anthony Points charged David L. Boren with frequenting with homosexuals is

attached hereto as Plaintiff's "Exhibit 2" and made a part hereof by this reference.

On August 11, 1978, the Defendant in a front page story, "Foe says Boren 'Overreached'", maliciously and intentionally libeled and villified Plaintiff, a copy of which is attached hereto as Plaintiff's "Exhibit 3" and made a part hereof by this reference.

On Saturday, August 12, 1978, Defendant published a news analysis entitled "Backlash to help Boren?" which article is attached hereto as Plaintiff's "Exhibit 4" and made a part hereof by this reference.

XIV.

The defamatory matter complained of herein was published within three weeks of the date of the primary election for the United States Senate.

XV.

The above stated articles, editorials and cartoons, when considered as whole, engendered in the mind of the reader a conclusion, impression, or opinion of the Plaintiff, GEORGE MISKOVSKY, to public hatred, contempt and obliquy, and is libelous per se; that the said articles, editorials and cartoons were composed and published by the Defendants well knowing the same to be false or unwilling to ascertain the true facts; and was done with reckless and wanton disregard of the truth.

XVI.

— The statements complained of in the aforesaid publications were wholly false, unprivileged, vicious, and malicious and the Defendant by means of said publications intended to damage and injure the Plaintiff, GEORGE MISKOVSKY, and Plaintiff has been injured in his character and reputation, professional standing in the community, and his chances of becoming United States

Senator were completely destroyed, all to his actual damage in the sum of Five Million Dollars (\$5,000,000.00).

Further, that Plaintiff has suffered loss of business in his law firm. That Plaintiff has suffered mental anguish and humiliation and his chances of becoming United States Senator were completely destroyed all as a result of the malicious acts of the Defendant, and all to Plaintiff's special damages in the sum of Five Million Dollars (\$5,000,000.00).

XVII.

The publications complained of above were willful and malicious and by reason thereof the Plaintiff, GEORGE MISKOVSKY, is entitled to punitive damages in the sum of Fifteen Million Dollars (\$15,000,000.00).

WHEREFORE, Plaintiff prays judgment against the Defendants in the sum of Five Million Dollars (\$5,000,000.00) actual damages, Five Million Dollars (\$5,000,000.00) special damages, and Fifteen Million Dollars (\$15,000,000.00) by way of punitive damages, the total of which is Twenty-Five Million Dollars, (\$25,000,000.00), for which Plaintiff prays and for costs and all other just and proper relief to which Plaintiff in law is entitled.

EVERETT J. SWEENEY
Suite 100 Commerce Building
Norman, Oklahoma 73069

ED MORRISON
505 Center Office Building
Tulsa, Oklahoma 74127
Attorneys for the Plaintiff

BY _____
ED MORRISON

CERTIFICATE OF MAILING:

I, Ed Morrison, do hereby certify that I mailed a true and correct copy of the above and foregoing Amended Petition to Gable, Gotwals, Rubin, Fox, Johnson & Baker, Attn: John Henry Rule, 20th Floor Fourth National Bank Building, Tulsa, Oklahoma 74119 of this — day of May, 1980, with proper postage affixed thereto.

ED MORRISON

EXHIBIT 1

GEORGE MISKOVSKY, SR.
U.S. SENATE

830 Hightower Building
Oklahoma City, Oklahoma 73102
Telephone
(405) 235-1375

August 10, 1978

The Honorable David Boren
Governor
State of Oklahoma
State Capitol
Oklahoma City, Okla.

Dear Gov. Boren:

Yesterday I attended a noon meeting of the Canadian County Democratic Women's Club at the Ponderosa Restaurant in El Reno. About three dozen members of the club were present as well as club vice president, Mrs. Donald J. (Floretta) Gholston of El Reno, and two other Democratic candidates for the U.S. Senate, Dean Bridges and Anthony Points.

I was called upon to address the group about issues and I did, as did Mr. Bridges.

Mr. Points addressed the group and distributed a campaign flyer (a copy of which is enclosed herewith) containing the following verbatim transcript:

"I am against homosexuals in the school systems. They are a threat to our children. They are like vultures 'preying' on our young."

"I am against homosexuals or bisexuals in office or government. They are a threat to our national security."

They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.

"There is a side to David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.

"I don't think that is what you want for a U.S. Senator."

In addition to distributing the above written bulletin, Mr. Points added, among other things, the oral categorical statement, "David Boren is a homosexual."

After the meeting one of the ladies said she had not heard of this before, and others said they had heard rumors about the charge.

It is the first time I have heard this direct, categorical statement made in public by a candidate for the U.S. Senate.

For this reason I am asking you to respond to the following questions:

Do you know what a homosexual or bisexual is?

Are you a homosexual or bisexual?

Have you ever been a homosexual or bisexual?

Have you ever engaged in homosexual or bisexual activity?

I believe it is the right of every citizen, if it can be ascertained, to know if a candidate for U.S. Senator is afflicted with this kind of abnormal behavior.

A U.S. Senator has access to highly sensitive information vital to the defense of this country and our NATO allies.

I believe it is the right of every citizen to know if a candidate is afflicted with any physical, mental or philo-

sophical weakness that might be dangerous to our national security or which might jeopardize the best interests of the majority of the people.

If a candidate is a homosexual, a person who is mentally deranged or a person of bizarre philosophical demeanor, then, the people have a right to know it.

And, the candidate should disclose it in order to protect his effectiveness as the representative of the majority and free himself from any politically motivated intrigue, blackmail, extortion or compromise to prevent disclosure of his true identity.

The people are entitled to an immediate response. Such response should be subscribed by you under oath.

Sincerely,

/s/ George Miskovsky
GEORGE MISKOVSKY

EXHIBIT 2

ANTHONY POINTS

Democrat For U.S. Senate

"The People's Voice"

I am in favor of our senior citizen social security's fixed income increasing in accordance to inflation.

I am in favor of the armed forces adopting a six month active duty enlistment of new recruits, giving them full veterans benefits and in this program they could keep a respective amount of hair. This program would beef up our military forces to a ready level.

I am in favor of the farmers receiving 100% parity. They are the backbone of our country.

I am in favor of cutting the price of gas and electric bills in half.

I am against the sale of military arms, plans or nuclear devices to Arabs. The Israelis and the Jewish people are our allies, not the Arabs.

I am against Arabs entering the United States in exchange for the reduction of the price of oil.

Our last three presidential administrations have had communistic overtones from the Panama Canal treaty through the selling of arms to the Arabs.

Coincidentally!! When Nixon let the Arabs into the United States in 1970, a lot of plutonium started disappearing. Arabs are buying buildings across the United States and are always demanding plutonium for their country. What is to stop them from making nuclear explosives in these buildings and then going back to their own country? I am in favor of conducting a full investigation on the massive amount of plutonium that has been disappearing since 1970.

I am against abortions.

I am against the human baby being cloned.

I am against sex changes.

I am against busing. No student should be forced to attend a different public school other than the one nearest to his residence.

I am against homosexuals in the school systems. They are a threat to our children. They are like vultures "preying" on our young.

I am against homosexuals or bisexuals in office or government. They are a threat to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.

There is a side to David Boren that is a known fact in legal and political circles and that's the fact that David Boren frequents with homosexuals and I'm putting it lightly. I don't think that is what you want for a U.S. Senator.

It is this type of activity, homosexuals or bisexuals in office along with U.S. Senators being blackmailed that is sending America down the tubes. If we don't have all of our bases covered, we will leave ourselves wide open to destruction in which we shall see a great nation crumble and fall.

Three of my opponents have held office before and not once have they stood on these major issues. They are good at playing verbal volleyball with issues and getting nothing accomplished. All they ever like to do is fool the public, get elected and go party in Washington.

If elected, I will put these issues before the people of Oklahoma for a vote and if passed, "By God" that's the way it's gonna be. Then I'll carry these issues on a national level.

If you believe as I do and are willing to donate one hour of your time in my campaign or a contribution for what you believe in, call me at 947-1698 or 495-1637. I need your support.

APPENDIX D**EXHIBIT 3**

Tulsa, Oklahoma, Friday, August 11, 1978

FOE SAYS BOREN 'OVERREACTED'

Miskovsky questions sexual conduct

By RICHARD TAPSCOTT
Tribune Capital Bureau

OKLAHOMA CITY—Senate candidate George Miskovsky said today he thinks Gov. Boren and editorial writers "overreacted" to Miskovsky questioning the governor's sexual preferences.

Miskovsky of Oklahoma City, quoting literature and statements of another senatorial candidate, Thursday asked Boren to say under oath whether he is a homosexual, a bisexual or ever had engaged in abnormal sexual activity.

Boren, flanked by his wife Molly at an airport news conference here, categorically denied the allegation, calling it a "vicious lie."

Miskovsky told reporters Thursday he was bringing to the public's attention statements made Wednesday in El Reno by senate candidate Anthony Points of Oklahoma City.

Miskovsky said today he was surprised by the outraged editorials denouncing him.

"I THOUGHT both the governor and the editorial writers overreacted," Miskovsky said. "They acted emotionally as if I had made the charge."

"I had heard the rumor, as have many others, for months. When it came to a head in a public forum, I

felt I should report it to the media and give the governor an opportunity to respond."

Boren has been the target of a whispering campaign for several years, but the gossip had not been made public until Miskovsky's press conference Thursday.

Miskovsky said he has had many calls since he sought Boren's response to the charges.

"I never had one that says I shouldn't have called it to the attention of the media," he added.

Rob Pyron, a spokesman for the Boren campaign, said the state headquarters received telephone calls until late Thursday evening.

"PEOPLE SEEM to be outraged by it," he said of the allegations.

Asked about the impact on Boren's campaign, Pyron added, "It would be kind of hard to say. I hope it presents to the people the differences in the kinds of campaigns being presented."

Points, a 31-year-old remodeling contractor, could not be found to comment on the furor his statements have created. He was not returning telephone calls and could not be found Thursday or today at his office or apartment.

Points repeated his statement on an Oklahoma City radio station this morning, but was not available to Tribune reporters.

Points has been circulating literature saying, "There is a side to David Boren that is a known fact in legal and political circles and that is the fact that David Boren frequents with homosexuals, and I'm putting it lightly," he said.

"I DON'T THINK that is what you want for a U.S. senator."

Miskovsky said that Points went further during a Wednesday forum sponsored by the Canadian County Democratic Women's Club.

At that meeting, Miskovsky said Points stated, "David Boren is a homosexual."

Points, considered a longshot candidate in the seven-man Democratic field, also has said he thinks half the public school teachers in Oklahoma are homosexuals.

Boren cut short a campaign swing through western Oklahoma Thursday to return to the capital to deny the charges.

Speaking to about 100 broom-waving supporters at the airport, Boren said he does not know Points.

"BUT IF HE repeated such a vicious lie, I would not care to know him.

"I will not dignify it with any further response. It's a shame a person has to be subjected to this kind of personal attack in order to serve the public.

"I particularly resent the statement because it reflects on the reputation of my wife, children and family, as well as myself."

Neither Miskovsky nor Points has provided any evidence to back up the allegations against Boren.

Miskovsky campaigned Thursday night in Ada and Allen.

He said he received positive responses there.

"I APPRECIATE the fact I have had a lot of calls about me having the courage to call this to the media's attention," he added.

Regarding editorial responses that have condemned Miskovsky's action, the two-time unsuccessful gubernatorial candidate said, "I have seen these rotten, dirty, scurillous, below-the-belt editorials before."

Boren told reporters the allegations will not cause him to change his campaign, which has been marked by the governor styling himself as being the target of the "Old Guard."

"People aren't interested in this kind of trash," he said. "They're more interested in the issues.

"I don't think anyone in Oklahoma will be foolish enough to believe this."

OKLAHOMA political observers said they see the allegation backfiring, if not helping Boren's campaign for the nomination.

"Depending on what his lead was before, which I think was good, this could well lock it up for him without a runoff," said one analyst.

"I see very little negative fallout for Boren."

Boren aides said the allegations also could help spur Boren supporters to work harder as the Aug. 22 primary approaches.

Another Boren campaign aide said he believes the allegation damages Miskovsky's chances, which were not considered good before Thursday.

"I think it will help us, (State Sen. Gene) Stipe and (former Congressman Ed) Edmondson," he added.

ANOTHER observer said the allegation at least places the spotlight on Boren and could help him pick up strength among undecided voters.

"Although Oklahoma has that kind of reputation, I don't think there are that many Anthony Points out there who are eager to join a 'Stop-Boren' movement with this," he added.

Another political analyst said the allegation could create a "sympathy vote" favoring Boren.

"The Anthony Points thing was nothing," he said.
"Miskovsky made a tremendous blunder."

Miskovsky appeared somewhat taken aback by the re-
actions to his news conference.

"I'm not Hitler's brother," he said.

APPENDIX E

EXHIBIT 4

OKLAHOMA PRESS
CLIPPING BUREAU
Oklahoma City, Oklahoma

Tulsa Tribune
Tulsa, Okla.
Circ. 79,456

BACKLASH TO HELP BOREN?

Candidates wait for reactions from personal attack

a news analysis

By WILL SENTELL
Tribune Capital Bureau

OKLAHOMA CITY—Backers of Gov. David Boren are trying to gauge effects of an unprecedented charge as contenders head into the final week of primary vote chasing for the U.S. Senate Democratic nomination.

Meanwhile, Muskogee rival Ed Edmondson is trying to hang a Republican tag around Boren in his drive for the nomination.

And McAlester Democrat Gene Stipe is apparently trying to trigger a backlash from publicity surrounding reports of a federal probe, with the self-styled populist the target.

Yet a race already riddled with question marks got another big one this week.

When longshot contenders Anthony Points and George Miskovsky quizzed Boren on his sexual life, specifically whether he is homosexual or bisexual, without offering any evidence, a muddy race got a lot muddier.

BESIDES THE FACT Boren categorically denied the allegation, which was roundly trounced on by the state press, supporters are trying to gauge what, if any, impact to expect.

Most of the early indicators are pointing toward more good than harm going to the governor.

A charge like the one lodged, the theory goes, will wind up bringing down fence sitters who might have otherwise stayed out of the race, or at least out of Boren and his Broom Brigade camp.

While Boren backers got little pleasure from the accusation, the charge could trigger a backlash of sympathy.

Maybe even enough to top the governor over to a first primary victory, something Boren backers were holding little hope for originally.

GUBERNATORIAL backers claim the charge has gotten the troops moving, helping lift any apathy aides have complained of repentedly.

Yet part of the problem with trying to gauge effect is that the nature of the charge is so original, so unheard of in public campaigns, that it's tough to tell how voters will respond.

Boren was saying earlier this week that it would be an "upset" if he could grab the nomination without a runoff, an uphill battle in a seven-man field.

Grabbing 50 percent plus one vote was something that supposedly went out the window when political heavyweights Ed Edmondson and Gene Stipe joined the fight.

The 50-50 shot Boren mentioned to one reporter may have increased slightly when the smoke finally clears.

BOREN GIVES the impression he's far more concerned with long-time arch nemesis Stipe than the bid of Edmondson, twice defeated senatorial contender.

Boren claims the Edmondson campaign is "almost non-existent" in counties he and wife Molly have visited.

Talks about Stipe are couched in language like the "Stipe machinery" and what he claims is the veteran law-makers' virtually unlimited money supply.

Meanwhile, Edmondson backers claim to be delighted at the lack of verbal attention from both Boren and Stipe.

SUPPORTERS OF the former Muskogee congressman are hoping his two chief rivals cut each other up, permitting Edmondson to cash in on a familiar name and use of a "wolf in sheep's clothing" theme aimed at the Boren camp.

"I'll be glad to go to the back door, I'll be glad to go in the cellar door if I have to," Edmondson says with a smile.

The Democrat has gone from ripping Boren's endorsement of the Republican-based Roth-Kemp tax cut proposal to hitting at Boren concerns for Republican issues in general.

"He is lining himself up with the few, the powerful and influential few," Edmondson says.

Edmondson television spots are picturing Boren as friend of the fat cat, friend of the \$80,000 home dwellers.

There are more questioning surrounding the campaign of Stipe, whose untested state appeal posed a question mark when he entered.

NEWS ACCOUNTS detailing Stipe's disputes over FBI and grand jury probes of him have put the candidate on the defensive at times.

Stories detailing Stipe's role in the McAlester Frozen Foods Co. dominated news reports for several days.

The 25 percent income tax ceiling Stipe hoped to peddle into a popular issue almost got lost in the publicity shuffle, at least for a while.

But the legislator is trying to turn the issue into an advantage.

He brings up the FBI-grand jury issue himself on the campaign trail.

Stipe jokes about it, denounces it and claims it's a political conspiracy, with Boren at the conspiracy controls.

The aim seems simple: Create a backlash of support for a "persecuted" contender.

Another picture of the campaign comes from the financial reports filed Friday.

In the one month he has been running, Stipe has raised \$267,566 in campaign funds, but he had to borrow most of it from himself.

Stipe showed his financing already is catching up with Boren and Edmondson but \$188,000 of Stipe's total represents loans he made to his campaign committee.

Stipe, a wealthy attorney who recently sold a large ranch south a month ago, has said he plans to spend much of his own money in the campaign.

BOREN REPORTED raising \$362,161, an increase of \$48,039 since he filed his last report on July 10.

Edmondson, who entered the race only two days before Stipe, reported he received \$51,353 in campaign contributions, including \$32,550 from labor groups and \$1,000 from Boren's former father-in-law, Reuel Little of Madill.

Edmondson listed \$5,000 contributions from six organized labor political action groups.

Stipe reported he already has spent \$237,962, leaving \$29,604 in his campaign fund. Boren, in his much longer

campaign, reported expenditures of \$319,162 and cash on hand of \$42,999.

Stipe listed 44 contributors who gave \$1,000 each, including Odie A. Nance of Edmond, who is state campaign manager for Attorney General Larry Derryberry's race for governor, and Gene McGill of Alva, a former state Democratic Party chairman.

EDMONDSON'S report showed he had spent \$44,192 and had a campaign fund balance of \$7,160.

Edmondson's son, Drew, said the labor donations represent individual contributions, not union dues.

"We stated at the outset we would state our positions and accept funds from those who believe as we do," young Edmondson said.

Meanwhile, Miskovsky and Points have formed a unique footnote to Oklahoma political history because of their charges at Boren.

Yet like Claremore educator E. Dean Bridges and Rosella Pete Saker all four continue to be plagued by predictions they are doomed to hover in the sub-5 percent region come vote day.

APPENDIX F

OKLAHOMA PRESS
CLIPPING BUREAU
Oklahoma City, Oklahoma

Tulsa Tribune
Tulsa, Okla.
Circ. 79,456

THE UNQUALIFIED CANDIDATE

As a candidate who received less than 2 percent of the vote in his last statewide race, 16 years ago, George Miskovsky desperately needed an issue to put some life into his hopeless campaign for the U.S. Senate. He thought he had found one. Thursday he asked Gov. David Boren, the acknowledged frontrunner in the Senate race, whether Boren is a homosexual or bisexual.

This, of course, is a cruel variation of the proverbial lawyer's question, Have you stopped beating your wife? Nothing Boren—or anyone else so questioned—could say would repair the damage caused by Miskovsky's irresponsible smear.

If Miskovsky had offered any evidence to support the suggestion of sexual abnormality there might have been a valid campaign issue. For the character of a candidate is important. A homosexual or a wife beater or a narcotics addict could be subject to blackmail or to other influences not in the public interest. But all Miskovsky apparently has to offer is a leaflet and a campaign statement by a third senatorial candidate—otherwise unknown. This third man asserted—again, without supply evidence—that Boren is a homosexual.

Democratic voters who had already decided to vote for or against David Boren should not be swayed by Miskovsky's descent to sewer politics. Boren should be judged

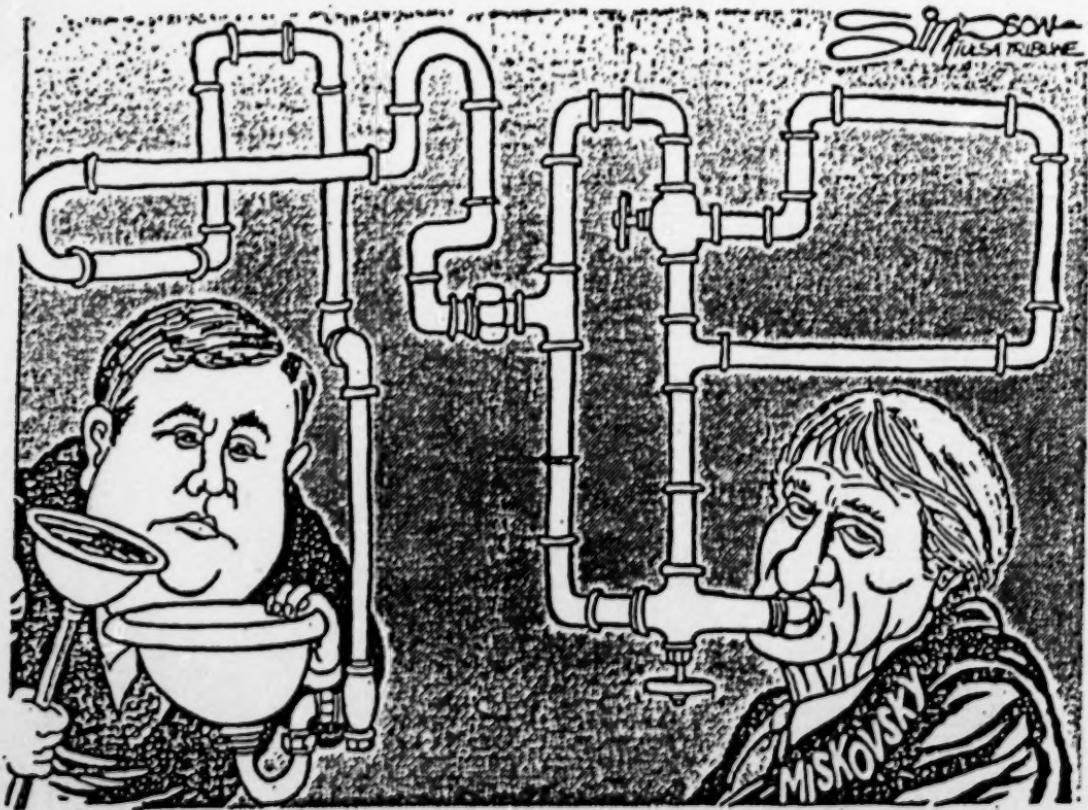
on his record of eight years in the Oklahoma House of Representatives and four years as governor and his qualifications should be weighed against those of his two serious primary opponents—former U.S. Rep. Ed Edmondson and state Sen. Gene Stipe.

Only one well-known senatorial candidate has been proven totally unqualified for the job. George Miskovsky should not get even 2 percent of the vote this time.

46a

APPENDIX G

EXHIBIT 6



47a

APPENDIX H

EXHIBIT 7



APPENDIX I

EXHIBIT 8

THE TULSA TRIBUNE—*Thursday, August 17, 1978*

Sometimes the press a shade hypocritical

E.N. Earley
Washington
etc.

SOMETIMES we members of Oklahoma's fourth estate are bit too pious.

Such is the case with the George Miskovsky—Gov. David Boren dispute.

When trailing Senate candidate Miskovsky asked Boren to answer questions about his sexual habits, editorial writers were enraged.

They called Miskovsky "A Voice From the Sewer."

Miskovsky's remarks were a cheap publicity stunt.

But the editorial writers' surprise and shock reeks of hypocrisy.

For nearly two years, reporters have been gossiping about Boren's private life. The stories grew each time the bartender brought another round or the reporters found a new audience.

No one knows where the rumors started, but soon they were so widespread they were being whispered in Boise City and Idabel.

Boren was aware of the gossip. He quietly sought advice from several political advisers, including some in Washington.

From every friend he apparently got the same advice: do nothing. You can't call a press conference to deny

slanderous gossip. Such a move would only give credibility to the rumors.

Before Miskovsky babbled, not one member of the press asked Boren publicly what was being bandied about so easily in the press rooms.

But when Miskovsky brought up the subject, the press was flabbergasted.

There is little doubt that Miskovsky's voice came from a sewer, but it is a sewer that was constructed—in part—by the press.

WHILE on the subject of the press:

Second District congressional voters should be wary of a tabloid being circulated by Mike Synar.

The last page of the attention-grabbing sheet contains an editorial (not The Tribune's), entitled: "Missing Congressman."

"Has anyone notified the Washington, D.C., Missing Persons Bureau about Rep. Ted Risenhoover?" the editorial begins. It says Risenhoover, who is Synar's Democrat primary opponent, skipped 48 out of 52 roll call votes in the House from Jan. 18 to May 10.

That is false and Synar knows it.

He has added an asterisk to the editorial explaining that Risenhoover actually missed the votes in the House Interior Committee, not on the House floor.

That explanation, however, is printed in the smallest type on the page.

The writer who authored this May 19 editorial was telephoned personally by a furious Risenhoover a few weeks after the editorial was published. He wanted the writer to tell the difference between committee meetings and votes on the House floor where Risenhoover has voted 80.3 percent of the time.

Risenhoover was so angry, his staff says he demanded a retraction.

But no retraction was printed. Now the editorial has come back to haunt Risenhoover and this time his complaints about the big-city press ring true.

APPENDIX J

EXHIBIT 9

Boren reverses tactics

Governor swears he disapproves of homosexuality
a news analysis

By WILL SENTELL
Tribune Capital Bureau

OKLAHOMA CITY—Gov. David Boren's decision to swear publicly that he never engaged in homosexual activity suggests he thinks the charge hurt his U.S. Senate primary bid.

And it's a sharp contrast to what candidate Boren was saying a week ago, when he repeatedly claimed there was nothing he could do beyond the previous, heated denials.

Boren, 37, accompanied by about 20 aides, put his hand on a white bible used in his marriage ceremony and swore Wednesday he is not now, nor ever has been, a homosexual.

GEORGE MISKOVSKY, the Senate candidate who questioned Boren's sexual orientation responded by saying the issue is dead.

"Boren got the message from the voters," Miskovsky said. "His delayed answer under oath to the questions I asked puts the issue to rest as far as I'm concerned."

At a Capitol news conference Wednesday afternoon, Boren stated:

"I, David Lyle Boren, being of lawful age and upon my oath do swear and state that I know what homosexuals and bisexuals are.

"I further swear that I am not a homosexual or bisexual.

"I further swear that I have never been a homosexual or bisexual.

"And I further swear that I have never engaged in any homosexual or bisexual activities nor do I approve or condone them," Boren said.

BUT WHY WOULD Boren forces, who earlier had been the ones saying the issue should be put to rest noting if anything the charge would backlash in Boren's favor, be the ones resurrecting it?

Part of the reason may stem from the primary results, something of a disappointment for Boren's troops.

A campaign entourage that bordered on being cocky about prospects for capturing the Senate nomination outright was surprised to see Boren come out with only 45 percent of the vote, almost 20 percentage points ahead of the second place finisher.

And in the campaign aftermath, the search for reasons, at least some people close to Boren concluded that charges Boren is a homosexual, mud that it is, hurt the governor's chances.

AS ONE SAID, "Whenever you throw mud, it sticks some."

And another political observer: "I think they thought it hurt them more than helped them," with hopes a Boren slick media performance could wipe out any damage.

Yet the bizarre sight of a governor saying he is not a homosexual came as a surprise to those who had heard Boren discuss the subject earlier.

"The effect has all been positive," Boren told a reporter last week in the aftermath of the charges which came, unsubstantiated, from two longshot contenders running for the Senate.

Boren pointed to the spontaneous financial contributions, the fact most Oklahomans are decent, that many

have been through divorce and could sympathize with his position.

WHAT COULD HE DO to combat the charges?

"There's nothing you can do," Boren replied repeatedly.

The charge and denial was made, Boren said, and suggested then that it should be set aside for good.

The accusation was mudslinging, the governor said, a last minute bid that would backfire.

And he said he thought the contrast in campaign tacts would stand out, prove beneficial come election day.

Apparently the differences didn't stand out sharply enough.

The candidate who reportedly predicted outright victory Tuesday, the candidate surrounded by aides saying 52, 54 percent, may have been stung by the results forcing him into a runoff with Ed Edmondson.

ASKED THE QUESTION point blank Boren only said it was "hard to say" whether the charge affected the primary, a statement he was making before vote day.

"As long as the primary campaign was in progress I did not think it would be appropriate to allow myself to be diverted from my campaign by the vile and malicious charges made by some candidates against me," he said.

"Now that those candidates are no longer in the race I think it is time once and for all to put to rest the vicious lies which have been hurled against me."

Boren press secretary Rob Pyron disagreed with suggestions the primary vote triggered the governor's public oath.

He pointed to the meager vote totals going to the two contenders who raised the issue, Anthony Points and George Miskovsky, to support his argument.

Instead, Pyron said, the decision was nearly spontaneous, one that came after "little discussion."

"SOMETIMES POLITICIANS are just like the rest of us, sometimes they just want to get something off their chest," Pyron said.

In a related development, Boren launched his bid for a Democratic runoff victory by challenging Edmondson to a debate on the issues.

Boren, who during the primary campaign declined to debate or appear on the same forum with his six opponents, decided to take the offensive.

He asked for the League of Women Voters to sponsor the debate, but today Edmondson said he would prefer a Democratic organization such as the state party organization arrange the debate instead.

EDMONDSON SAID he learned through the media of Boren's request for the debate and "welcomes the prospect."

Edmondson also said he preferred that any debate with Boren be free of restrictions as far as what subjects can be covered.

"I think the fact that Gov. Boren wanted a non-partisan organization to coordinate the debate shows once again that he does not represent Democratic beliefs," Edmondson said.

He said Tulsa television station KTUL-TV and radio station KRMG had offered one hour of time for the debate.

In another announcement, Edmondson said he had visited with state Sen. Gene Stipe, the man who finished third in Tuesday's balloting, and said "Sen. Stipe and two of his top campaign leaders have firmly assured me of their support and help in the upcoming election.

"THERE IS AN agreement between us that we (Edmondson and Stipe) had been speaking for the majority of Democrats in Oklahoma."

Edmondson, 59, went on to say he hopes the age differential between him and Boren, who is 37, will become an issue in the campaign because he said Oklahoma voters "like to have someone with mature judgment" representing them in the U.S. Senate.

He said he also anticipates sources of campaign funding to become an issue in both camps. Edmondson is expected to come under fire for accepting political donations from sources outside Oklahoma—especially labor oriented groups.

"We expect to prove that 95 percent of our funds come from within Oklahoma and that of those that do, they have very close interests and represent several people within this state."

APPENDIX K

THE TULSA TRIBUNE—*Friday, August 25, 1978*

BOREN'S OVERKILL

The spectacle of Oklahoma's Governor David Boren calling a press conference to swear on the Bible that he was not a homosexual not only marked some kind of a first in American political history, but it was utterly unnecessary.

The sensational innuendo advanced by George Miskovsky in a desperate effort to gain attention for his senate campaign had already exploded in Miskovsky's face. His minuscule vote was proof enough.

The governor pleaded not guilty in the face of no evidence to the contrary. Surely, he has a soft, baby face. But so did Audie Murphy, the most decorated U.S. hero of World War II. The governor opened himself to an immediate lampoon by his runoff opponent, Ed Edmondson, who publicly swore he was not and never intended to be a Republican.

Instead of swearing, the governor should have simply shrugged.

APPENDIX L

Oklahoma Statutes Tit. 12 § 1441

Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

DEC 28 1983

No. 83-882

ALEXANDER L STEVENS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

GEORGE MISKOVSKY,

Petitioner,

v.

TULSA TRIBUNE COMPANY and
NEWSPAPER PRINTING CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court
of the State of Oklahoma

BRIEF IN OPPOSITION OF RESPONDENTS
TULSA TRIBUNE COMPANY AND
NEWSPAPER PRINTING CORPORATION

JAMES M. STURDIVANT

Counsel of Record

JOHN HENRY RULE

GABLE & GOTWALS

20th Floor Fourth National

Bank Building

Tulsa, Oklahoma 74119

(918) 582-9201

Attorneys for Respondents

December 29, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether the judgment of the Oklahoma Supreme Court affirming the trial court's sustention of respondents' demurrers to petitioner's libel petition, and refusal to permit amendment of that petition, rests on "adequate and independent state grounds" and is therefore not reviewable under 28 U.S.C. § 1257(3).
2. If the judgment of the Oklahoma Supreme Court is reviewable under 28 U.S.C. § 1257(3), whether that judgment is correct under the facts alleged by petitioner and the First and Fourteenth Amendments to the United States Constitution.*

* The caption of the case contains the names of all parties to the proceeding below. Pursuant to Rule 28.1, the Court is advised that respondent Tulsa Tribune Company is the privately-owned publisher of The Tulsa Tribune, and has no parent, subsidiaries (except wholly-owned subsidiaries) or affiliates. Tulsa Tribune Company and World Publishing Company, the respondent in No. 83-883, own all of the stock in respondent Newspaper Printing Corporation. Newspaper Printing Corporation has no parent, subsidiaries (except wholly-owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	Page
OPINION AND ORDER BELOW	1
CONSTITUTIONAL PROVISIONS AND STATUTES..	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
 ARGUMENT	
I. The Decision Below Rests on an Adequate and Independent State Ground and Therefore Should Not Be Reviewed by This Court	4
II. The Decision Below Does Not Infringe on Peti- tioner's Free Speech Rights Under the First and Fourteenth Amendments; Any Alleged Depriva- tion Was Not Caused by State Action, and the Alleged Deprivation Is Therefore Not Review- able by This Court	7
CONCLUSION	10
 APPENDIX	
A—OKLA. STAT. tit. 12, § 1441	1a
B—OKLA. STAT. tit. 12, § 1443 (1971)	2a

TABLE OF AUTHORITIES

CASES:	Page
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982)	9
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)....	3, 4
<i>Greenbelt Cooperative Publishing Ass'n v. Bresler</i> , 398 U.S. 6 (1970)	8
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974)	8
<i>Lugar v. Edmondson Oil Co.</i> , 457 U.S. 922 (1982)..	9
<i>Michigan v. Long</i> , — U.S. —, 103 S.Ct. 3469 (1983)	4
<i>Miskovsky v. Oklahoma Publishing Company</i> , 654 F.2d 587 (Okla.), cert. denied, — U.S. —, 106 S.Ct. 235 (1982)	4
<i>Monitor Patriot Co. v. Roy</i> , 401 U.S. 265 (1971)....	8
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	3, 4
<i>Ocala Star-Banner Co. v. Damron</i> , 401 U.S. 295 (1971)	8
<i>M. F. Patterson Dental Supply Co. v. Wadley</i> , 401 F.2d 167 (10th Cir. 1968)	5
<i>Paul v. Davis</i> , 424 U.S. 693 (1976)	9
<i>Thompson v. Newspaper Printing Corp.</i> , 325 P.2d 945 (Okla. 1958)	5, 6, 8
 CONSTITUTIONAL PROVISIONS AND	
STATUTES:	
U.S. CONST. Amend. I	2, 3, 4, 5, 6, 7, 9
U.S. CONST. Amend. XIV	2, 3, 7, 8, 9
28 U.S.C. § 1257(3)	4
OKLA. STAT. tit. 12, § 1441.....	2, 3, 4, 5, 6
OKLA. STAT. tit. 12, § 1443 (1971)	2, 6
 OTHERS:	
51 U.S.L.W. 3162 (1982)	4
53 Okla. Bar Journal 1751	1

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

No. 83-882

GEORGE MISKOVSKY,
Petitioner,
v.

TULSA TRIBUNE COMPANY and
NEWSPAPER PRINTING CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court
of the State of Oklahoma

BRIEF IN OPPOSITION OF RESPONDENTS
TULSA TRIBUNE COMPANY AND
NEWSPAPER PRINTING CORPORATION

Respondents Tulsa Tribune Company and Newspaper Printing Corporation respectfully submit that a writ of certiorari should not issue to review the opinion and judgment of the Supreme Court of the State of Oklahoma entered on June 21, 1983.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Supreme Court has been officially reported at 53 Okla. Bar Journal 1751, and ap-

pears in the Petitioner's Appendix at 1a [hereinafter Pet. App.]. The order of the Oklahoma Supreme Court denying petitioner's motion for rehearing appears at Pet. App. 16a.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. CONST. Amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."
2. U.S. CONST. Amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."
3. OKLA. STAT. tit. 12, § 1441, reprinted in Appendix A to this Brief.
4. OKLA. STAT. tit. 12, § 1443 (1971),¹ reprinted in Appendix B to this Brief.

STATEMENT OF THE CASE

In one respect petitioner's Statement of the Case must be corrected. This action arises out of petitioner's unsuccessful campaign for election to the United States Senate from the State of Oklahoma in 1978. The genesis of the action was petitioner's repetition during the campaign, in a letter released to the press, of another candidate's charge that still a third candidate, then Governor and now Senator David Boren, was a homosexual, and request that Governor Boren answer, under oath, four questions, among which was, "Are you a homosexual or bisexual?"²

¹ This statute was in effect at the time of the publications at issue. It was repealed by 1980 Okla. Sess. Laws ch. 68, § 1, effective April 10, 1980, but was reenacted as OKLA. STAT. tit. 12, § 1443.1.

² The letter appears in pp. 29a-31a of Appendix A to the Petition for Writ of Certiorari.

In his Statement of the Case, petitioner asserts categorically that, "The letter made clear that [petitioner] himself was making no allegations about Governor Boren." Petition for Writ of Certiorari ("Pet.") at 4. Petitioner's opinion as to the import of the letter is not irrefutably correct, as he implies. The letter does not state that petitioner "makes no allegations about Governor Boren himself."

SUMMARY OF ARGUMENT

The decision below rests on adequate and independent state grounds; accordingly, this Court should deny the Petition for Writ of Certiorari. The Oklahoma Supreme Court determined that Miskovsky's libel Petition failed to state a cause of action under OKLA. STAT. tit. 12, § 1441. In so ruling, it relied on an Oklahoma case that predates this Court's decisions in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Oklahoma Supreme Court's reference to language in *Gertz* indicating that a libel claim may not be based upon statements of opinion was unnecessary to the judgment below.

The decision below does not infringe on the petitioner's rights of free speech under the First and Fourteenth Amendments to the United States Constitution. To hold that petitioner has no cause of action for libel does not prevent him from speaking. The alleged chilling of his speech rights, if it has occurred, is not caused by the decision below, but by action of private parties. Accordingly, the alleged deprivation does not constitute state action, is not proscribed by the First and Fourteenth Amendments, and is not reviewable by this Court. Furthermore, the opinion below does not grant respondents "virtual absolute immunity" to speak about candidates for public office, the premise of petitioner's argument that his first amendment rights are somehow deprived by the decision.

Finally, respondents would note that the questions presented for review by petitioner were also presented for review by him in *Miskovsky v. Oklahoma Publishing Company*, 654 P.2d 587 (Okla.), cert. denied, ____ U.S. ___, 103 S.Ct. 235 (1982).³ This Court should deny the Petition in this case just as it did in the *Oklahoma Publishing Company* case.

ARGUMENT

I. The Decision Below Rests on an Adequate and Independent State Ground and Therefore Should Not Be Reviewed by This Court.

This Court has determined to deny review under 28 U.S.C. § 1257(3) if the decision by the state court below rests on adequate and independent state grounds. *E.g., Michigan v. Long*, ____ U.S. ___, 103 S.Ct. 3469 (1983). While the decision below refers to a privilege under the First Amendment to the United States Constitution against a libel claim based upon publication of a statement of opinion, the decision also rests clearly on the Oklahoma Supreme Court's determination that petitioner's First Amended Petition failed to state a cause of action for libel under OKLA. STAT. tit. 12, § 1441 and principles of Oklahoma law enunciated long before this Court's decisions in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The alternative holding based on state law was sufficient to support the judgment and was not compelled by any interpretation of federal law. Under *Michigan v. Long, supra*, this Court should deny the Petition for Writ of Certiorari.

³ In the *Oklahoma Publishing Company* case, petitioner presented four questions for review, the first and fourth of which were identical to the questions presented by him in this case. See the summary of the Petition for Writ of Certiorari in No. 81-2407, 51 U.S.L.W. 3162 (1982).

The Oklahoma Supreme Court tested the First Amended Petition under long-standing principles of Oklahoma law—whether the publication complained of is libelous *per se*, and if not, whether the publication is libelous *per quod*, that is, susceptible of a defamatory meaning derivable from extrinsic facts and circumstances, which must be specifically pleaded and supported by proof of special damages. *E.g., M. F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167 (10th Cir. 1968) (construing Oklahoma law).

The Oklahoma Supreme Court first found that the publications at issue were not libelous *per se*, writing as follows:

None of the publications charge the plaintiff with a commission of a crime or with anything that the plaintiff might not have legally and properly done. The factual data therein set forth as *facts* are true as is alleged in the allegations in plaintiff's petition. When viewed even in their most derogatory sense as related to the plaintiff, while possibly unflattering or even reprehensibly false in *their conclusions*, they are expressions of opinion, privileged under the First Amendment to the United States Constitution. Nor do the publications expose the plaintiff to public hatred, contempt, ridicule or obloquy, or tend to deprive him of public confidence, or injure him in his occupation within the meaning of 12 O.S. 1981, § 1441. *Thompson v. Newspaper Printing Corporation*, Okl., 325 P.2d 945 (1958).

Pet. App. at 9a (emphasis in original).

The Oklahoma Supreme Court then determined that the publications at issue were not libelous *per quod*, stating that the publications "are clear and unequivocal in their meaning and import and therefore immutable to innuendo." Pet. App. at 14a. Petitioner claimed that one cartoon showed him committing sodomy and that the cartoon falsely accused him of committing a crime; the Oklahoma Supreme Court rejected the claim, stating:

An objective examination of the cartoon published August 11, 1978, neither by its unembellished presentation nor by the addition of any possible innuendo imparts to the plaintiff the commission of the crime of sodomy, and when viewed in its most derogatory sense, does no more than express the writer's opinion of the political tactics of plaintiff's political campaign.

Pet. App. at 14a-15a.

The Oklahoma Supreme Court's decision, respondents submit, rests on two alternative grounds, the nonactionability of statements of opinion under the First Amendment, and the nonactionability of the publications at issue under the court's interpretation of OKLA. STAT. tit. 12, § 1441. In determining that the publications were not actionable under that statute, the court cited *Thompson v. Newspaper Printing Corp.*, 325 P.2d 945 (Okla. 1958), in which the Oklahoma Supreme Court sustained the trial court's dismissal of a libel petition for failure to state a cause of action based on a political advertisement which contained a cartoon showing the county assessor picking the pocket of a taxpayer. In *Thompson*, the Oklahoma Supreme Court held that the publication was privileged under OKLA. STAT. tit. 12, § 1443 (1951). That statute was recodified in 1971, was in effect at the time of the publications at issue, and is reprinted in Appendix B to this Brief.

In the decision below, the Oklahoma Supreme Court found that the publications at issue were not actionable under state law because of privileges established by state law, in addition to holding that the First Amendment prevented a libel claim based on the publications at issue. There was an adequate and independent state ground for the decision and, accordingly, petitioner's first question—whether the United States Constitution supplants state defamation law on the issues of defamatory meaning, opinion, and burden of proof as to truth—need not be reviewed.

II. The Decision Below Does Not Infringe on Petitioner's Free Speech Rights Under the First and Fourteenth Amendments; Any Alleged Deprivation Was Not Caused by State Action, and the Alleged Deprivation Is Therefore Not Reviewable by This Court.

Petitioner's second question for review is whether the United States Constitution requires a balancing between the rights of media defendants and the rights of candidates for public office to freedom of speech and protection of reputation. The thrust of his argument is that the state, in denying him a cause of action for libel, chills his speech, the theory being, we presume, that out of fear that he will be unable to obtain redress for defamatory rebuttal, he will curb his speech during a political campaign.

The theory is too tenuous a reed on which to base a constitutional attack on the Oklahoma Supreme Court's decision, and if accepted would violate, rather than vindicate, rights of free speech under the First and Fourteenth Amendments. Furthermore, respondents submit that the chilling of which petitioner complains—assuming any exists—is not caused by his fear that he will be unable to recover damages for defamatory rebuttal, but of the rebuttal itself; since that alleged chilling is caused by private rather than state action, there is no constitutional issue for this Court to review under petitioner's second question. Finally, the premise of petitioner's chilling argument—that the decision below grants the press "virtual absolute immunity"—is faulty. The decision does no such thing; it merely holds that petitioner had not stated a cause of action based on a discrete set of facts, and indeed recognizes the elements of a political candidate's cause of action for libel.

To prevail on his chilling theory, petitioner must first convince this Court that press publications containing true facts and statements of opinion based thereon, about a candidate for public office, may give rise to a libel cause

of action, for in order to prevent the chilling of his speech rights which he alleges, petitioner must be granted the right to proceed and recover against respondents on his libel claim. The essence of his claim is that respondents falsely accused him of calling Governor Boren a homosexual, even though he admits releasing to the press a letter to Governor Boren in which he repeated that charge made by another. Even if it is assumed that respondents did charge petitioner with having called Governor Boren a homosexual, can it reasonably be said that such a charge is knowingly or recklessly false under the admitted facts? Respondents submit that the answer is "no" and that a contrary answer would violate this Court's repeated pronouncements that speech in the course of a political campaign is especially deserving of constitutional protection. See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-301 (1971).⁴

Petitioner's second question fails to merit review because it is unclear that the alleged chilling of his speech rights is caused by any state action at all. Unless the alleged infringement of his constitutional rights was occasioned by the state, there is no ground for review by this Court; the Fourteenth Amendment protects citizens from deprivations of constitutional rights by the state, not from deprivations of other citizens. E.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Respondents submit that the alleged chilling of petitioner's speech rights—assuming it exists—is caused not by his fear of

⁴ Petitioner also argued that the cartoon reprinted at Pet. App. 46a falsely accused him of committing the crime of sodomy. The Oklahoma Supreme Court rejected this argument, holding that even if the cartoon were construed in its most derogatory sense, it was a nonactionable opinion of petitioner's political tactics. Pet. App. at 14a-15a. That decision not only follows *Thompson v. Newspaper Printing Corp.*, 325 P.2d 945 (Okla. 1958), but is also consistent with this Court's decision in *Greenbelt Cooperative Publishing Ass'n v. Kreiser*, 398 U.S. 6 (1970).

an inability to recover damages for defamatory rebuttal, but by the rebuttal itself, which issues from a private person. The state, even if it protects the rebuttal from a libel claim, cannot be said to be responsible for such speech in the sense that it has authorized or compelled it. The alleged deprivation of which petitioner complains, therefore, is not caused by the state, is not proscribed by the First and Fourteenth Amendments, and is not reviewable by this Court. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991 (1982), in which this Court noted the rule that private action does not amount to state action for purposes of the Fourteenth Amendment, and that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 457 U.S. at 1004 (citations omitted). Even if respondents relied on the protection in state law for their "chilling rebuttal," the state's protection of such speech does not transform essentially private actions into state actions for purposes of the Fourteenth Amendment. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 943 (1982) (Burger, C.J., dissenting). The initiative for the "chilling rebuttal" rests with the private individual. In short, the deprivation of his constitutional rights which petitioner raises in his second question for review was not caused by the state, does not present a constitutional issue, and is not reviewable by this Court.*

Finally, the premise of Petitioner's chilling argument is that the decision below grants the press "virtual absolute immunity" and that because such broad immunity exists, there political candidates fear to speak. The prem-

* In his second question, petitioner indicates that his "right to protect his reputation" is also protected by the Fourteenth Amendment. It is clear that petitioner's reputational interest is not the type of "property" protected from deprivation by the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693 (1976).

ise is faulty. All the decision below holds is that on a discrete set of facts, petitioner has no libel claim. In fact, the decision specifically recognizes that political candidates may maintain libel claims in appropriate circumstances, and sets forth the elements of such a libel claim. Pet. App. at 7a-8a. Since redress for defamation is available to political candidates, petitioner's chilling argument must fail.

CONCLUSION

The Petition for Writ of Certiorari should be denied. The decision below rests on an adequate and independent state ground, and petitioner's other issues do not merit review.

Respectfully submitted,

JAMES M. STURDIVANT
Counsel of Record
JOHN HENRY RULE
GABLE & GOTWALS
20th Floor Fourth National
Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201
Attorneys for Respondents

APPENDIX A

OKLA. STAT. tit. 12, § 1441 provides:

Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tend to scandalize his surviving relatives or friends.

APPENDIX B

OKLA. STAT. tit. 12, § 1443 (1971) (in effect at the time of the publications in issue) provided in pertinent part:

A privileged publication or communication is one made:

* * *

* * *

. . . . Third. By a fair and true report of any legislative or judicial or other proceedings authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.

. . . No publication which, under this section, would be privileged, shall be punishable as libel.

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